

## **Part 2            Pre-Award**

### **Section 02 Determining Appropriate Award Instruments**

#### **A. Principles**

Purpose. This Grants Policy Directive (GPD) provides guidance for determining whether to use a grant, cooperative agreement, or procurement contract when making an HHS award. It is based on the Federal Grant and Cooperative Agreement Act (FGCA) of 1977, as amended (31 U.S.C. 6301-08), which specifies the appropriate use of these legal instruments. It supplements 45 CFR Parts 74 and 92.

This GPD also provides guidance related to making the determination of award instrument when the award involves information collection activities (as defined in the Office of Management and Budget's (OMB) regulations at 5 CFR 1320, "Controlling Paperwork Burdens on the Public," implementing the Paperwork Reduction Act, as amended).

Scope. The policies in this GPD apply to all HHS programs and awards.

#### **B. Definitions**

The terms "grant" and "cooperative agreement" are distinguished in certain sections of this GPD. However, in GPDs, in the HHS regulations at 45 CFR Parts 74 and 92, and in other HHS regulations affecting grant programs or their administration, the terms "grant" and "grantee" generally include "cooperative agreement" and "recipient of a cooperative agreement."

#### **C. Use of Grants or Contracts**

The decision to use a grant or a procurement contract should be based on the primary purpose of the award and its intended beneficiary in accordance with the FGCA criteria (as indicated below). In some cases, the specific circumstances of a program or transaction may require additional analysis in order to make this determination. In addition, ambiguities may arise concerning awards to entities which receive both grants and contracts. Even in these cases, however, the appropriate instrument can be determined by establishing the principal intent and beneficiary of the award. This section includes examples of these situations and the rationale for selection of a particular award instrument.

Grants and Cooperative Agreements. HHS awarding offices shall use a grant or cooperative agreement when the principal purpose of the transaction is the transfer of money, property, services or anything of value to accomplish a public purpose of support or stimulation authorized by Federal statute. The primary beneficiary under a grant or cooperative agreement is the public, as opposed to the Federal Government.

Contracts. HHS awarding offices shall use a procurement contract when the principal purpose of a transaction is acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government.

Examples of Ambiguous Circumstances.

Funding for conferences may be awarded through grants or by contracts depending on the nature of the activity and the primary beneficiary. For example, a conference whose purpose is to exchange and disseminate information among the public should be funded using a grant. While the awarding office may benefit from information exchanged at the conference, the principal intent of the award is to stimulate dissemination of knowledge to benefit the public. If a conference is initiated by a Federal agency, funding should be provided under a contract. For example, a conference to provide specialized training services to grantees which could otherwise be provided by the Federal agency should be handled by contract. Although the recipients of the training benefit from it, the principal intent of the award is for the government to procure training services in lieu of conducting its own training program, which directly benefits the Federal agency.

Evaluations/studies are also types of activities that can be awarded as either grants or contracts. A study intended to track service benefit impacts of Federal programs at the State and local level should be funded using a grant if the primary beneficiaries are the State and local community programs being studied. However, a study of a specific demonstration program should be funded by contract if the primary purpose of the award is to prepare a mandated report on the program for the Secretary to send to Congress. In the first scenario, while the Federal Government might benefit from the information obtained from the study, the primary beneficiaries are the State and local agencies and, ultimately, the recipient service population. In the second scenario, the report is for the direct use of the Federal Government.

Some recipients may receive funds in the form of grants and contracts for seemingly similar purposes. An example is when contracts are awarded by a Federal agency to an organization for providing impact assessments of proposed legal or policy changes on grantee populations. The

organization, however, might also receive grants to conduct demonstration projects. In the first instance, contracting for the impact assessments is appropriate since the Federal Government is acquiring the service for its own use. Grants are a more appropriate funding vehicle in the latter instance. Although the Federal agency should benefit somewhat from the insights gained through demonstration projects, the public is the primary beneficiary.

Statutory Language and Instrument Selection. The statute authorizing a program or activity may sometimes specify use of an award instrument seemingly inconsistent with the FGCA or may include language indicating that a particular relationship is intended. Regardless, the choice of appropriate instrument should always be determined based on the criteria identified in the FGCA and reflected in C.1 and 2, unless the provision requiring the use of a grant, contract, or cooperative agreement indicates that the restriction is being imposed notwithstanding the provisions of the FGCA. In that case, the statutory language would prevail.

#### **D. Using Grants or Cooperative Agreements**

The distinguishing feature between a grant and cooperative agreement is that, under a cooperative agreement, substantial involvement is anticipated between the awarding office and the recipient during performance of the funded activity. This involvement may include collaboration, participation, or intervention in the activity.

The determination resulting in the choice of a cooperative agreement is largely one involving "programmatic" considerations as differentiated from grants management ones. It should be based primarily on whether the level of Federal involvement under a cooperative agreement will have programmatic benefits that the recipient would not otherwise have available to it in carrying out the project. A cooperative agreement should not be used solely as a means of exercising greater control over a recipient or the project than would be the case under a grant.

#### **E. Information Collection and Instrument Selection**

Use of a Grant or Contract. The criteria and principles that apply to the selection of the appropriate award instrument also apply when the award involves the collection of information [as defined in 5 CFR 1320.3 (c)]. Consistent with Paragraph C.2. above, a procurement contract would be the appropriate award instrument when the collection of information is primarily intended for the use of the Government. Grants or cooperative agreements may also involve the collection of information. In these cases, to ensure that OMB approval is obtained when required

(see Paragraph E.2. below), particular attention should be paid to whether a grant (as opposed to a cooperative agreement) is the appropriate instrument and, under a grant, to limiting the awarding office's role in the information collection.

OMB Approval Requirements for Information Collections. Office of Management and Budget (OMB) approval is required if a Federal agency conducts or sponsors a collection of information, as indicated below, unless the information is collected from nine or fewer respondents. Under the OMB requirements, collection of information under a contract or cooperative agreement is deemed "conducted or sponsored" by the Federal Government. Awarding offices/OPDIVs must comply with their internal OPDIV requirements and HHS requirements (Circular No. IRM-402) when seeking the required OMB approval.

Collection of information under a grant would not normally be considered "conducted or sponsored" by the Federal Government. However, if the collection of information under a grant is undertaken at the direct request of the awarding office or the terms and conditions of the award require awarding office approval of the collection of information or collection procedures, then OMB approval is required.

## **F. Responsibilities**

### Chief Grants Management Officer.

When a disagreement as to whether a contract or grant is the appropriate award instrument cannot be resolved by the Contracting or Grants Management Officer and the Program Official, the Operating Division's Chief Grants Management Officer and the Principal Official responsible for Acquisition will serve as arbiters. The Chief Grants Management Officer may also be consulted, if necessary, to assist in determinations concerning the appropriate use of a grant or cooperative agreement.

The OPDIV Chief Grants Management Officer and OPDIV Senior Information Collection Official (or designee) must review and approve any information collection under a cooperative agreement or an information collection "conducted or sponsored" under a grant consistent with 5 CFR 1320 prior to submission to OMB.

### Grants Management Officers (GMOs).

GMOs are responsible for ensuring that the appropriate award instrument is used.

GMOs must ensure that grant or cooperative agreement awards involving collection of information have appropriate terms and conditions that inform the recipient of OMB approval requirements and the associated OPDIV process.

GMOs are responsible for coordinating with their awarding office/OPDIV Senior Information Collection Official (or designee) on information collection activities under grants and cooperative agreements.